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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 439

PANTZER LUMBER COMPANY, PETITIONER

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 123–128) is reported at 162 F. 2d 277. The opinion of the district court (R. 95–97) is reported at 70 F. Supp. 716. The district court's findings of fact and conclusions of law appear at pages 99–101 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered June 13, 1947 (R. 129). On September 10, 1947, the time for filing a petition for

a writ of certiorari was extended to and including November 12, 1947, by order of Mr. Justice Burton (R. 132), and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the commodity sold by petitioner was "lumber" within the meaning of Maximum Price Regulations 215 and 290.

2. Whether petitioners' operations were covered by Maximum Price Regulations 215 and 290 as "sales out of distribution yard stock".

3. Whether petitioner's prices exceeded the maximum prices permissible under the regulations.

STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, as amended by the Act of June 30, 1944, 58 Stat. 632 (50 U. S. C. App., Supp. V, 925 (e)), provided in pertinent part as of May 3, 1945, the date of the institution of the proceeding involved herein:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business

may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by

> the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The pertinent provisions of Maximum Price Regulations 215 and 290 in effect during the period involved in this case are set out in the discussion of those Regulations, *infra,* pp. 7–11. The full texts of both Regulations are published in Pike and Fisher, *OPA Price Service, Lumber Desk Book,* Vol. 2, pp. 31,001 et seq., and Vol. 1, pp. 12,001 et seq., and 8 F. R. 14145, 9 F. R. 2554, 12276, and 9 F. R. 5727.

STATEMENT

On May 3, 1945, the Price Administrator filed a complaint in the District Court for the Eastern District of Wisconsin, pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended, alleging that petitioner had sold lumber at prices in excess of the maximum prices established by Maximum Price Regulations 215 and 290 and praying for a judgment for three

times the amount by which petitioner's prices exceeded the allowable maximum prices thereunder (R. 1–3).[1] Following a trial before the court without a jury, the district court found that petitioner had sold lumber on eleven different occasions between August 2, 1944, and January 18, 1945, for the aggregate sum of $9,538.66, which totalled $5,528.63 above its ceiling price (R. 100–101). Judgment was rendered against petitioner for $8,292.94, or one and one-half times the overcharges, together with costs (R. 101–102). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment was affirmed (R. 129).

Briefly, the facts as shown by the evidence and as found by the trial judge are as follows:

Petitioner operated a retail lumber yard at Sheboygan, Wisconsin, and in connection with and as part of the yard it operated a mill with various machinery such as saws, shapers and moulding machines (R. 11, 15, 34–35, 95). During 1944, petitioner manufactured tent poles of various sizes and lengths which were made principally from Sitka Spruce lumber purchased by petitioner from Oregon and Washington (R. 11–12).

[1] The complaint also sought and the district court granted injunctive relief, which is not now in issue. It also charged a violation of M. P. R. 196 in the sale of dowels, but that charge was dropped after a pre-trial conference at which the trial judge stated that in his opinion, petitioner had not sold dowels at prices in excess of its ceiling price for that particular item (see R. 5–6).

The trial judge found (Finding 3, R. 99–100) that—

> * * * The residue of the lumber from the manufacture of the tent poles was of various sizes and shapes and in normal times would have been sold as scrap. In the manufacture of the tent poles the residue also went through the saws and molding machines and was surfaced on two or more sides. The knots were cut out and the edges were cut off and the pieces were cut to specified dimensions and lengths. * * *

Petitioner "tried to sell the lumber" consisting of the residue from the pole manufacturing operations by advertising in trade publications and eventually sold a number of orders to a Chicago toy manufacturer (R. 13–15; Pl. Exs. 1 and 2, R. 17, 29, 81–93; Findings 3 and 4, R. 99–100). These sales, aggregating $9,538.66 during the period from August 2, 1944, to January 18, 1945 (Finding 6, R. 100), were made both on a lineal and board foot basis; the prices on the residue sold on a lineal foot basis varied from $30 to $110 per 1,000 feet, while on a board foot basis the price generally was $100 per 1,000 feet (see Pl. Ex's 1 and 2, R. 81–93; R. 95). An O. P. A. lumber price specialist testified and the trial judge found that the applicable maximum price fixed by M. P. R. 290 was $15 per 1,000 board feet (R. 18–19, 96–97), which was the price fixed by the regulation for "non-listed" lumber for which the seller

had failed to obtain O. P. A.'s approval of a maximum price (see M. P. R. 290, Article V, Sec. 11 (d), *infra,* p. 11). Petitioner had not applied to O. P. A. for approval of a specified price for these sales of the residue (R. 69, 100).

ARGUMENT

Since the issues presented by the petition require an understanding of the scope and operation of Maximum Price Regulations 215 and 290, we start with a description of their pertinent provisions in the context of the entire regulatory scheme.

As its name—"Distribution Yard Sales of Softwood"—implies, M. P. R. 215 (8 F. R. 14145, 9 F. R. 2554) covered sales of various types of softwood lumber by distribution yards. Section 3 (b) provided:

> *Products covered.*—This regulation covers sales out of distribution yard stock of any lumber or lumber products for which "direct-mill" maximum prices are fixed in the following maximum price regulations, as well as any later revisions or amendments:
>
> * * * * *
>
> Sitka Spruce Lumber—M. P. R. 290.
>
> * * * * *

Section 4 of the Regulation provided that items were to be priced by taking the f. o. b. mill maximum price for the species as specified

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in the mill regulation in effect at the time of delivery, and adding thereto the mark-ups for freight, handling and profit. Section 13 provided that other mark-ups could be taken in addition to freight and profit if certain processing was performed upon lumber; it stated in part as follows:

> *How to figure additions for working, kiln drying and pressure treatment*—(a) ***Basic workings.***—The following additions per MBM may be made to the maximum price of the most economical size from which the desired size may be obtained when a distribution yard is required to perform the workings and the end product is a non-standard size.[2]

Following paragraph (a), was a pricing table entitled "Maximum Milling Charges."

The Regulation also made provision for special specifications, workings or extras, which were not specifically priced under the Regulation. Section 14 read as follows:

> *Special specifications, workings, or extras.*—For special workings, specifications, services or extras not specifically priced under any provision of this regulation, the seller should apply to the Lumber Branch of the Office of Price Administration, Washington, D. C., for instructions. In the application the seller must set forth the amount customarily charged (not to

[2] Section 13 (a) was amended in October, 1944 (9 F. R. at 12276), but the amendment made no material change.

exceed the maximum price fixed by the regulation previously controlling), for the special working, specifications, service or extra, or in the absence of a customary charge, the amount which in his opinion represents a fair and reasonable charge, together with a statement of how it was arrived at. Instructions will be furnished by letter or telegram. After filing an application the seller may quote and deliver at the requested price, but must not accept final payment until a price has been approved. If a price is not approved within 30 days after application has been made, the price for which approval is requested shall be deemed to have been approved and may be used by the seller. Instructions issued pursuant to this paragraph apply only to the particular seller who has applied for them.

The term "Distribution Yard" was defined in Section 16 (a) as follows:

> "A typical distribution yard" is a wholesale or retail lumber yard which gets lumber from mills or other yards; unloads, sorts, and resells or redistributes it; which regularly maintains a varied stock of lumber from different regions; which gets its lumber, except for local species, mostly by rail and sells mostly for truck shipment; which is equipped to make quick deliveries of many different items of lumber; and which has been located at its particular site in order to be near a lumber consuming area.

As is evident from the terms of Sections 3 (b) and 4 of M. P. R. 215 (*supra,* pp. 7–8), a seller subject to that regulation determined his price by adding various permissible charges to the f. o. b. mill price fixed by the applicable mill regulation. In the instant case, therefore, since petitioner sold Sitka Spruce lumber, the f. o. b. mill price fixed by M. P. R. 290 furnished the basis for determining its distribution yard maximum price under M. P. R. 215. We turn therefore to M. P. R. 290 (9 F. R. 5727).

Section 2 of M. P. R. 290 specified the products covered by it as follows:

> This regulation covers all Sitka spruce (picea sitchensis) lumber, * * * whether the grades, sizes and specifications are specifically named in the price tables in Article V or not. * * *

Article V of the Regulation contained twelve price tables for various grades, specifications and sizes of Sitka Spruce. The particular item sold by petitioner was not of the character or specifications comprehended by any of these tables. However, Section 11 provided:

> (a) If a seller wishes to sell a grade which is not specifically priced in the price tables or wishes to make an addition for special workings, specifications, services, or other extras for which additions are not specifically permitted, he must apply to the Lumber Branch, Office of Price Ad-

ministration, Washington 25, D. C., for a maximum price. * * *

* * * * *

(d) On any sale involving a "non-listed" price or addition contemplated by paragraph (a) of this section, if the seller, for any reason, shall have failed to apply for approval of a maximum price under paragraph (a), the maximum price for the item sold shall be $15.00 per 1,000 board feet, which maximum price shall include all allowances or additions for grade, size, conditions, special workings, specifications or other extras.

1. Petitioner's principal contention is that the residue from the tent pole operations which was sold to the Chicago toy manufacturer was not "lumber" within the purview of Maximum Price Regulations 215 and 290 but was what is known in the trade as "dimension stock" or "cut stock" (Pet. 8–15). Preliminarily, it should be noted that the trial court, after hearing evidence on both sides with respect to this issue, found as a fact that the material was "lumber" within the meaning of that term as used in the Regulations (Finding No. 4, R. 100). Consequently, petitioner's attack upon the credibility of the Government's evidence on this issue as measured against its conflicting evidence, is plainly not an appropriate matter for appellate consideration. Rule 52 (a), F. R. Civ. P. In any event, it is clear that the trial judge was correct in this finding.

Petitioner's claim that the wood involved here was not "lumber" because of the milling operations it had performed, ignores the pricing theory underlying the regulation. While M. P. R. 290 was designed to set, so far as possible, fixed prices for all standard sizes and cuts of Sitka Spruce, nevertheless, by reason of the Administrator's realization that items other than standard sizes and cuts might be sold, the regulation expressly provided that it covered all Sitka Spruce lumber "whether the grades, sizes and specifications [were] specifically named in the price tables in Article V or not." Section 2, M. P. R. 290, *supra,* p. 10. The regulation then provided that non-standard or "non-listed" items could be sold by application to O. P. A. for a maximum price. Section 11, M. P. R. 290, *supra,* p. 10; see also similar provisions in Section 14, M. P. R. 215, *supra,* pp. 8–9.

This regulatory pattern resulted, as the district court found (R. 96), from the fact that it would have been impossible to draft a regulation providing a fixed price for every conceivable length and width. Consequently, to limit the application of the regulation only to those lengths, widths, and workings specifically mentioned would invite evasion of the regulation and defeat effective price control, for a seller could then take a piece of lumber listed in the regulation and, by sawing off one foot, or even one inch, or planing one side, contend that the product was not covered by

the regulation. Certainly the provisions of Sections 2 and 11 of M. P. R. 290 effectively block any such contentions or evasion. The administrative intention to include the items in question here within the coverage of the regulations is further buttressed by the fact that on May 12, 1944, which preceded the dates of the sales in question here, the Administrator issued and published an interpretation covering this specific situation, and to which the lower courts gave effect (R. 96–97, 125). That interpretation read as follows:

> *Mill trims.*—Short lengths not specially priced, sold on the basis of grade or other specification for use in the manufacturing of toys, small boxes, novelties, etc., are lumber and are subject to the special pricing provision under the applicable mill regulation.

That this administrative construction should be followed is clear from the opinion in *Bowles* v. *Seminole Rock and Sand Co.*, 325 U. S. 410, 413–414, where this Court said:

> Since this involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Petitioner, however, argues that the administrative construction of the term "lumber" is contradicted both by a W. P. B. order, set out in the margin,[3] defining the term (Pet. 8–11), and by the testimony of its witnesses that in trade practice this material was not considered to be lumber (Pet. 14–15). While it is true that the W. P. B. order did excude the materials in question here from its definition of lumber, that fact has no bearing on whether the items were to be treated as lumber for purposes of price regulations, for the functions, purposes and powers of O. P. A. and W. P. B. were different. When W. P. B. defined lumber, it did so with a view to limiting the terms to such types of that commodity as were essential to the successful prosecution of the war, so that their use could be restricted by a priorities system. On the other hand, O. P. A. was concerned with fixing maximum prices for all commodities, without regard to the necessities of a priority system and solely with the view to maintenance of the general price

[3] W. P. B. Order No. L–335 (R. 38–40), issued June 23, 1944, defined lumber as follows:

"'Lumber' means any sawed lumber of any species, size or grade, including round edge, rough dressed on one or more sides or edges, dressed and matched, ship-lap worked to a pattern or grooved for splines, except dogwood, persimmon, rattan, balsam and aircraft grade of Sitka spruce, shingles, lathes and slabs, mile ties and railroad cross ties, sawed or hewed, edgings, trim and offal less than three inches wide or less than four feet long, unless made into standard commercial lumber sizes or patterns."

structure and avoidance of inflation. Obviously, therefore, the definition utilized by W. P. B. would be narrower than that used by O. P. A. Furthermore, the use of the W. P. B. definition for price control purposes would have the effect of invalidating portions of M. P. R. 290, for the W. P. B. definition excludes, among other things, "shingles, lath and slabs"—items which are specially priced in Table 16 of M. P. R. 290, entitled "Sitka Spruce Lath and Shingle Bands." In short, what the term "lumber" means can only be resolved by reference to the purpose sought to be accomplished, for as is so common in statutes and administrative regulations the same word used in different contexts acquires different meanings. What W. P. B. considered lumber is of no significance in the instant case.

Petitioner's argument that the testimony of its witnesses shows that in trade practice only such wood as is cut to standard sizes and lengths is considered lumber (see, e. g., R. 57, 61), is similarly unavailing, for even if that were local trade understanding, it is clear, as we have already shown, that Maximum Price Regulations 215 and 290 were in terms given far more comprehensive coverage so as to control and provide mechanisms for price determination for nonstandard items. Section 14, M. P. R. 215, *supra,* pp. 8–9; Sections 2 and 11 M. P. R. 290, *supra,* pp. 10–11. And it is well settled that the Administrator's "definition need not necessarily be one which conforms to

common usage, or to dictionary precision, or to the understanding of the trade." *Marlene Linens* v. *Bowles,* 144 F. 2d 874, 876 (E. C. A.). See also, *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 96; *Bowles* v. *Jones,* 151 F. 2d 232, 234 (C. C. A. 10).

2. Petitioner also contends (Pet. 15–16) that Maximum Price Regulations 215 and 290 did not cover its operations whereby the scrap lumber involved was derived because the operations were not "sales out of distribution yard stock" within the meaning of Section 3 (b) and 16 (a) of M. P. R. 215, supra, pp. 7, 9. Petitioner argues that the items sold to the toy company were not products of its lumber business but were those of its finishing mill, an entirely different operation. However, the trial court found (Finding of Fact 2, R. 99):

> * * * In the operation of its lumber yard the defendant ordinarily purchased lumber from mills other than yards, which was generally shipped to its yard by rail, where it was unloaded, sorted and resold, generally for truck shipment. The defendant regularly maintains a varied stock of lumber and is equipped to make quick deliveries of many items of lumber. Defendant's lumber yard is located at this particular site in order to be near a lumber consuming area.

This finding, of course, places petitioner's operations squarely within the definition of a typical "distribution yard," as set forth in Section 16

of M. P. R. 215. Nor does the fact that the lumber was changed in size and shape by processing in petitioner's yard alter the applicability of the regulation. There is nothing in the regulation that so provided. Moreover, petitioner's argument ignores the significance of Section 13 (a) of the regulation (*supra,* p 8), which provided for additions to the maximum price for milling performed by a distribution yard in conformance with the table of "Maximum Milling Charges" there set forth, and of Section 14 (*supra,* pp. 8–9), which allowed a seller to apply for additions to the maximum for "special workings, specifications, services or extras not specifically priced under" the regulation.

It is clear, therefore, that M. P. R. 215 contemplated that distribution yards, which performed milling work in connection with yard operations, would be covered by the regulation and that the prices for the lumber as milled would be subject to the maxima fixed by the regulation.

3. Finally, petitioner contends (Pet. 16) that "the worst error of all those made by the court below was that it assumed that if the material here was lumber, and if the regulations applied to these operations of Petitioner, then the maximum base price permissible was $15,000 [$15.00] per thousand board feet (R. 127). The court below rejected Petitioner's argument that its sales were covered by Condition 20 of Table 5 of M. P. R. 290, which concededly allowed maximum prices

higher than those charged by Petitioner." The error, however, is petitioner's, for at the trial, after government counsel had asserted in his opening statement that the only issue was whether petitioner's sales were covered by the regulations in question and that under M. P. R. 290 the base price for the lumber was $15 per thousand feet by reason of petitioner's failure to obtain O. P. A. authorization for any other price for this "non-listed" item (R. 7–9; see also Order Following Pre-Trial Conference, R. 5–6), petitioner virtually stipulated that the issues were thus narrowed and stated that "we do not take issue with the method of pricing as stated by counsel" (R. 9). Thereafter, the entire trial concerned the questions discussed in points 1 and 2 above and no evidence was taken or inquiry made as to whether the pricing method advanced by the Government and acceded to by petitioner was correct. In this setting, it would seem that petitioner is foreclosed from asserting that the pricing method adopted below was error, for otherwise the Government would be deprived of the opportunity, which would have been available had this issue been timely raised at the trial, to meet and overcome petitioner's contention. This is not mere technical insistence on petitioner's laches, but is bottomed on the undeniable fact that further evidence would have been necessary to determine with any degree of certainty whether

the lumber was of grades, sizes and specifications such as to qualify under Table 5 or any of the other eleven tables contained in Article V of M. P. R. 290.

In any event, petitioner's present contention as to the proper method of pricing the lumber is wrong and is predicated upon an unwarranted application of only one sentence of the Regulation taken entirely out of its context. Petitioner points to Item 20 under Table 5, Article V of M. P. R. 290 which reads:

> Cut Stock: Special cut-up stock to specified sizes, use R/L price of grade specified.

Petitioner argues that this specification described the lumber in question and that since the lumber was "clear cuts," Price Table 5 of M. P. R. 290, entitled "Sitka Spruce Finish and Clears," applied. The error in this approach is that petitioner, being a distribution yard, ascertained its price by starting with M. P. R. 215. That regulation contemplated the determination of the distributor's price by adding various charges for freight, milling, etc. to a base price for the lumber as received by the distribution yard, the base price in turn to be derived from the applicable mill price regulation. The lumber received by petitioner was not "clear cuts" to which Table 5 of M. P. R. 290, the applicable mill price regulation,

could be applied.[4] Accordingly, since no other table in M. P. R. 290 covered the lumber as prepared by petitioner and since petitioner failed to apply for a price, its price was $15 per thousaid feet as provided by Section 11 (d), Article V, M. P. R. 290 (*supra*, 11).

CONCLUSION

The findings and judgments below are correct and no conflict of decisions or question of general importance is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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[4] Petitioner argues that the courts below confused the issue by not appreciating that regardless of what petitioner bought, what it sold was "clear cuts." However, as shown in the text, what petitioner bought and reworked as a distributor is the only factor relevant for purposes of utilizing M. P. R. 290 in arriving at an initial base price. Moreover, it is not entirely clear that what petitioner sold was "clear cuts" within the meaning of Table 5, M. P. R. 290 (see, e. g., R. 12), and had the issue now raised been presented at the trial, the Government might have adduced evidence to show that it was not.

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